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No. 04-1336

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DELMY SAFIE, individually and as Personal Representative of the ESTATE OF ALEJANDRO T. SAFIE,

Petitioner,

v.

CARLOS SAFIE, individually and EXECUTIVE BANKING CORPORATION, a Florida corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION FOR RESPONDENT CARLOS SAFIE

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STATEMENT OF THE CASE

In her Petition for Certiorari, Petitioner asks this Court to get proactive in the law-making and policy-setting process of the State of Florida. Petitioner asks the Court first to re-write long-standing Florida case law governing the rules for revocation of trusts. Petitioner asks the Court second to reconstitute Florida's appellate court structure and, in the process, cast aside decades of debate, state constitutional provisions and amendments, and a rule of appellate procedure. Petitioner clothes her requests in terms of Due Process, but she has no claim that any state constitutional amendment, law, or appellate rule is unconstitutional. Rather, Petitioner argues that Florida's trust law is out of step with an alleged "modern trend," and its appellate court system is supposedly "defective." Petitioner has nominated this Court to fix Florida's trust law and court system. But these issues are singularly within the province of the State of Florida, and this Court has no basis for getting involved.

This case is an uncomplicated trust challenge. Alejandro T. Safie established a revocable *inter vivos* Trust in 1981. Mr. Safie was, during his lifetime, the Trustee. The Trust named Respondent Carlos Safie the successor Trustee. The *res* of the Trust consisted of shares in a bank Mr. Safie had founded and controlled. Under the Trust, the bank shares were to be distributed to Mr. Safie's two sons, with the older son, Respondent Carlos Safie, receiving 51% and Carlos's younger half-brother, Alejandro Matias Safie, receiving 49%. Petitioner is Mr. Safie's second wife and personal representative, as well as the mother of Alejandro Matias Safie (but not of Carlos Safie). After Alejandro T. Safie died, Petitioner brought an action in Miami-Dade County, Florida Circuit Court to declare the Trust revoked or modified.

Petitioner's principal evidence was a will that distributed the bank shares differently than the Trust. The will gave Petitioner shares and reduced the sons' percentage interests. The will effectively shifted controlling interest in the bank from Carlos Safie to Petitioner and her son, Alejandro Matias Safie.

On Respondents' summary judgment motion, the trial court found that the Trust had not been revoked according to its express terms and therefore the Trust controlled over the will. The Court specifically relied on *Euart v. Yoakley*, 456 So. 2d 1327, 1328 (Fla. 4th DCA 1984), which holds that a will can revoke a trust only where the trust has been revoked in strict conformity with its terms of revocation and the will clearly manifests an intent to revoke. The *Euart* court had in turn relied on *MacFarlane v. First National Bank of Miami*, 203 So. 2d 57, 60 (Fla. 3d DCA 1967), which set forth the "strict conformity" requirement for revocation based on general trust law that "a valid trust, once created, cannot be revoked or altered except by a reserved power to do so."

Petitioner complains in her Petition that "the lower courts declined to give reasoned opinions that justified its outcome," that "Petitioner is left with no explanation why the decedent's [supposedly] clear testamentary intent . . . was not followed," and that she remains in "total darkness" as to why her arguments were rejected. In fact, the trial court explained its ruling in a separate written order granting summary judgment, a second time in another written order correcting clerical mistakes, and a third time in an written order denying Petitioner's motion for rehearing.[1] The three written orders

[1] The three written orders are attached as "Appendix A" to Petitioner's Writ of Certiorari Petition.

together include multiple paragraphs of findings that the Trust had not been revoked and a conclusion of law based on *Euart* and *MacFarlane*.

Florida's Third District Court of Appeal *per curiam* affirmed ("PCA") the trial court's ruling with cites to *Euart* and *MacFarlane*. Petitioner asked for rehearing and a written opinion under Florida Rule of Appellate Procedure 9.330(a), which the Third DCA rejected. Then, in an effort to circumvent a Florida constitutional provision that eliminates supreme court review of PCA decisions,[2] Petitioner asked the supreme court to invoke its All Writs jurisdiction under Art. V, § 3(b)(7) of the Florida Constitution. The supreme court denied that petition. Petitioner charges now that the Third DCA has refused to explain how *Euart* is controlling. But the PCA reinforces what every court reviewing this case has understood – that a mechanical application of *Euart* to the trial court's finding that the Trust had not been revoked entirely resolves the case. Petitioner's claim that *Euart* remains "unsettled in Florida" is unaccountable, and Petitioner's professed ignorance is either a stubborn refusal to admit legal defeat or a matter of willful blindness.

Petitioner includes in her petition several red herrings. Petitioner continues to argue that a supposed "modern trend" in trust law, which apparently calls for indeterminate inquiries into the intentions of decedents, should replace the certainty of the "strict conformity" revocation requirements of *Euart* and *MacFarlane*. According to Petitioner, this "modern trend" has been adopted by all of one State, Nebraska. In fact, the Nebraska case Petitioner relies on, *In re: Wendland-Reiner Trust*, 677 N.W. 117 (Neb. 2004), has nothing to do

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[2] Art. V, § 3(b)(3) Fla. Const.

with whether a will can revoke trust. *Wendland* is a fact-specific case where the issue was whether a letter from the trustee sufficed to amend the trust in question under the particular amendment requirements in the agreement. The cite to *Wendland* is in any case irrelevant to the extent Florida has rejected any approach different from its long-standing precedent in *Euart*.[3]

Petitioner also references in her petition the so-called "merger doctrine," which once could have been used to argue against the validity of trusts where the settlor also acted as trustee. But this doctrine was superseded twenty-five years ago by a Florida Statute, § 689.075(1)(g), which expressly provides that *inter vivos* trusts "shall not be held invalid . . . because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee." Petitioner contends that Respondents' reliance on the plain language of § 689.075(1)(g) is "wrong as a matter of law." However, Petitioner has nothing meaningful to back up her statement, and that explains why Florida's Third DCA did not waste its time writing about the "merger doctrine."

Petitioner's Statement of the Case suggests no basis for certiorari review.

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[3] Petitioner also continues to expound on Alejandro T. Safie's alleged "clear testamentary intent." Petitioner claims that an affidavit by the alleged "draftsman" of the later will drawing supposed conclusions about Mr. Safie's intent went "unchallenged." That affidavit has never been anything more than a series of unproven allegations, which Respondents at no point in the underlying proceedings admitted. As it turned out, this "draftsman" did not even know about the existence of the Trust. Petitioner has no finding or adjudication regarding Mr. Safie's intentions because the issue was moot. Since the trial court found that the Trust had not been revoked, it was unnecessary to get into the vagaries of what Alejandro T. Safie intended by his will.

REASONS FOR DENYING THE PETITION

I. THE RIGHT TO DEVISE PROPERTY UNDER THE FOURTEENTH AMENDMENT IS A NON-ISSUE

Petitioner claims the first issue for review is whether "a decedent's right to devise property is protected by the Fourteenth Amendment of the United States Constitution." Respondent Carlos Safie has never denied that the decedent in this case, Alejandro T. Safie, had the right to devise property. Indeed, as Trustee, Carlos Safie is bound in defense of the Trust to argue in favor of that right. The issue as Petitioner has framed it therefore presents no case or controversy.

The real controversy lies in Petitioner's assumption that a will is the only vehicle for devising property. In fact, the law recognizes many such mechanisms. In Florida, an *inter vivos* trust is expressly recognized and legislated by the Florida Statutes as a mechanism for devising property. *See* § 689.075, Fla. Stat. The issue facing the trial court in this case was what to do where a will has terms inconsistent with a revocable trust. Florida, like every State in the Union, has case law addressing just this issue, and that is *Euart*, 456 So. 2d at 1328.

It is well settled that questions involving property, trust, and probate are areas of traditional, and important, state concern. *See, e.g., Boggs v. Boggs*, 520 U.S. 833, 861 (1997), (Breyer, J., dissenting) (arguing that Louisiana state law was not preempted by ERISA in part because "the state law in question involves family, property, and probate – all areas of traditional and important, state concern") (citations omitted); *Zschernig v. Miller*, 386 U.S. 421, 440 (1968) (noting that

"the several States, of course, have traditionally regulated the descent and distribution of estates"). There is, in this case, no federal statute like ERISA or threat to the nation's foreign policy (as in *Zschernig*) that might compel this Court to interfere with Florida's authority to decide trust and probate issues. Florida thus has every right to establish laws controlling trusts and wills. Petitioner's apparent disagreement with *Euart* has nothing to do with any legitimate Due Process concerns. Accordingly, this Court has no basis for certiorari review of Florida's law on trusts and wills as announced in *Euart*.

II. THE PER CURIAM AFFIRMANCE IN THIS CASE DEPRIVED PETITIONER OF NO DUE PROCESS RIGHTS

There is no recognized Due Process right animated by a written opinion itself. By the end of the appeal, the trial court has ruled and made some pronouncement on the ruling (in this case, the trial court announced and confirmed its ruling in three written orders), the issues have been briefed before the appellate court, oral argument has usually been held, there has been colloquy with the panel (as happened in this case), and the basis for the PCA should be readily apparent. Where the party is at the end of the appellate road, Due Process does not require a written explanation why the appealing party has lost again.

Petitioner does not go so far as to claim that PCA decisions are, in of themselves, unconstitutional. This Court itself has utilized PCAs many times. *See, e.g., Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 537 U.S. 99 (2002) (per curiam affirmed by "an evenly divided court"); *Free v. Abbott Laboratories*, 529 U.S. 333 (2000) (same); *Nat'l Motor Freight Traffic Association, Inc. v. United States*,

371 U.S. 223 (1962) (holding, per curiam, that "the motions to affirm are granted and the judgment is affirmed"); *Gordon v. State of Texas*, 355 U.S. 369 (1958) (affirming per curiam with cites to the "Twenty First Amendment of the Constitution of the United States" and *Carter v. Virginia*, 321 U.S. 131 (1944)); *Bailey v. Richardson*, 341 U.S. 918 (1951) (per curiam affirmed by an "equally divided court"); *Frost v. Corporation Commission of the State of Oklahoma*, 274 U.S. 719 (1927) (affirming per curiam "on the authority of *Chicago Great Western Railway Co. v. Kendall*, 266 U.S. 94, 100, 45 S. Ct. 55, 69 L. Ed. 183"). Instead, Petitioner attempts to connect her supposed Due Process argument to discussions about the duties of judges to announce reasoned opinions, typically for purposes of public accountability and instilling confidence that judges are doing their job. (The trial court in this case wholly satisfied that duty by its three written orders). These duties do not embody rights, but are matters of public policy that can be weighed against important interests in judicial economy, managing over-burdened dockets, and bringing finality to cases, all of which commend PCAs.

Due Process also does not guarantee multiple layers of appeal. Petitioner argues that the lack of a written opinion is depriving her of a right to appeal in the Supreme Court of Florida. But in Florida, an appeal in the district court of appeal is the *only* level of appeal as of right for civil litigants. The Supreme Court of Florida has underscored this point:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level [in 1956] was prompted by the great volume of cases reaching

> the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

See Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958)[4]; *see also* Arthur J. England, Jr., *Asking For Written Opinion From The Court That Has Chosen Not To Write One*, 78 Mar. Fla. B.J. 10, 10 (March 2004) (explaining that "our district courts were created in 1956 with the express intention that they be final with respect to appeals as of right in Florida"). The PCA in this case therefore deprived Petitioner of no appellate rights.

Notwithstanding Florida's appellate structure, which strictly circumscribes the supreme court's jurisdiction, complaints arose among lawyers and jurists in Florida that PCAs were not being used as they were intended (and as it was properly used in this case) for easy cases where an established rule of law applies to a set of facts, but for controversial cases as well. In response, an extra layer of protection was added for litigants in Florida. Under Florida Rule of Appellate Procedure 9.330(a), adopted in 2002, a

[4] These same concerns addressed in *Ansin* about unmanageable supreme court case-loads and bringing finality to district court of appeal decisions led, over twenty years later, to Florida's constitutional amendment eliminating supreme court jurisdiction over PCAs. *See Jenkins v. State*, 385 So. 2d 1356, 1358-59 (Fla. 1980).

party can petition the district court of appeal for a written opinion in those cases where the party legitimately believes a written opinion will "provide a legitimate basis for Supreme Court review." Much of Petitioner's argument is directed toward this rule, which, as Petitioner acknowledges, was the result of passionate debate on both sides. Petitioner, who sought relief in this case under Rule 9.330(a) and lost, posits the "passionate argument" against the Rule, but gives short shrift to the other side, and in fact misrepresents that side. Petitioner cites to an article from former Supreme Court of Florida Chief Justice Arthur England in which Justice England writes that Rule 9.330(a) is conceptually flawed and should be repealed. Petitioner conveniently omits Justice England's point that no rule qualifying the constitutional elimination of supreme court jurisdiction over PCAs is necessary.[5] Indeed, it was Justice England who, in the interests of finality and substantially limiting appellate traffic in the Supreme Court of Florida, championed the 1980 state constitutional amendment eliminating supreme court review of PCAs. *See* England, *Asking For a Written Opinion*, 78 Mar. Fla. B.J. at 10, 12.

What is at stake in this debate is not, as Petitioner claims, Fourteenth Amendment Due Process rights, but rather how

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[5] Justice England, a "regular appellate practitioner," wrote that he "considers himself able to determine a court's reasoning for a decision from briefs and colloquy in oral argument." England, *Asking For a Written Opinion*, 78 Mar. Fla. B.J. at 14. Justice England's call for repeal of Rule 9.330(a), Fla. R. App. P., was based on the untenable position appellate lawyers were placed in having to ask for a written opinion at the same time as asking for a motion for rehearing. *See id.* at 14-16.

best to manage Florida's appellate court system. This Court has made clear what its role is in these kinds of debates:

> It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the *finality and effect of their decisions* provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress.
>
> We might go still further, and say, with undoubted truth, that *there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory.*

Missouri v. Lewis, 101 U.S. 22, 30-31 (1879) (emphasis added); *see also North v. C.B. Russell*, 427 U.S. 328, 338-39 (1976) (citing *Missouri v. Lewis* and holding that a two-tier trial court system in Kentucky violated neither the due process nor equal protection guarantees of the Constitution).

Here, Petitioner does not argue that Florida's constitutional elimination of supreme court review of PCAs violates the Due Process Clause (nor could she), and Petitioner plainly has no argument that Florida Rule of Appellate Procedure 9.330(a) is somehow unconstitutional since it gives litigants more process than they are entitled.

Rather, Petitioner argues that Florida's appellate system is "structurally defective" and asks this Court to provide a remedy: "This Court should require Florida [to] adopt a procedural safeguard, with appropriate standards, which grants the Supreme Court of Florida jurisdiction to review any case which presents the question of exceptional importance." Petition for Writ of Certiorari at 19. This would radically change Florida's appellate court structure under its state constitution, and that is way beyond the authority of this, or any other, federal court.

CONCLUSION

Accordingly, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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